

To: White, Elizabeth[white.elizabeth@epa.gov]; Miller, Kevin[Miller.Kevin@epa.gov]
From: Hammitt, Jennifer
Sent: Thur 11/16/2017 4:31:17 PM
Subject: Fwd: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Ex. 5 - Attorney Client; Attorney Work Product

Sent from my iPhone

Begin forwarded message:

From: "Walker, Johnny (USADC)" <Johnny.Walker@usdoj.gov>
Date: November 16, 2017 at 11:25:25 AM EST
To: "Hammitt, Jennifer" <Hammitt.Jennifer@epa.gov>
Subject: RE: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Ex. 5 - Attorney Client; Attorney Work Product

From: Hammitt, Jennifer [mailto:Hammitt.Jennifer@epa.gov]
Sent: Wednesday, November 15, 2017 2:43 PM
To: Walker, Johnny (USADC) <JWalker3@usa.doj.gov>
Subject: RE: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Hi Johnny –

I have talked to my client office here, and we can propose the following:

Ex. 5 - Attorney Client; Attorney Work Product

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Jennifer Hammitt

Attorney-Advisor, Information Law Practice Group

Office of General Counsel, General Law Office

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, NW, MC-2377A

Washington, DC 20460

(202) 564-5097

From: Walker, Johnny (USADC) [<mailto:Johnny.Walker@usdoj.gov>]

Sent: Tuesday, November 14, 2017 11:53 AM

To: Hammitt, Jennifer <Hammitt.Jennifer@epa.gov>

Subject: FW: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Hi Jennifer,

See below. American Oversight wants to search the identified custodians. Can you give me an anticipated timeframe for that process?

Johnny

From: Sara Creighton [<mailto:sara.creighton@americanoversight.org>]

Sent: Tuesday, November 14, 2017 11:50 AM

To: Walker, Johnny (USADC) <JWalker3@usa.doi.gov>

Subject: Re: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Johnny,

Thank you for this update. We look forward to receiving the four hard-copy documents tomorrow.

As for the additional custodians, we do think it would be appropriate to conduct supplemental searches for other responsive records in those custodians' email or hard-copy files. We are obviously aware this process will take some time. Let me know what the agencies think would be a reasonable amount of time to do the search, and then once they've done the search and we know how many documents there are to review, we can hopefully agree upon a proposed production schedule to include in our 12/1 joint status report.

Best,

Sara

On Nov 9, 2017, at 7:11 PM, Walker, Johnny (USADC) <Johnny.Walker@usdoj.gov> wrote:

Sara,

I am following up on EPA's November 1, 2017, responses to American Oversight's questions.

First, with respect to the four records located in the CMS search explained below, EPA will need a few extra days until next Wednesday, November 15 to complete any release. The officials who must review them are out of the country until Monday, November 13. Sorry about the delay.

As for additional potential custodians, the Office of the Executive Secretariat has run a search for any additional names of political appointees or SES officials on responsive documents. Those searches revealed the following few names on the following documents:

Bennett, Tate (Elizabeth), Associate Administrator, Office of Public Engagement and Environmental Education (OPEEE)

- Mentioned in an email from EPW to Ryan Jackson about document requests for issues of interest to EPW. (Document produced as EPA-HQ-2017-006057 0000404)
- CC'd on a series of five emails surrounding an invitation to Richard Keigwin to appear before the Senate Agriculture, Nutrition and Forestry Committee on May 11 (see Document EPA-HQ-2017-006057 0000449 and following)

Brown, Byron, Deputy Chief of Staff for Policy

- CC'd on two emails concerning an invitation from FMC Corp to Admin Pruitt to go visit Superfund site. (Produced as Document EPA-HQ-2017-006057 0000398 and EPA-HQ-2017-006057 0000401)

Dravis, Samantha, Associate Administrator, Office of Policy (OP)

- Sent a response to an email from Farm Bureau transmitting their appreciation of Admin Pruitt's decision to deny the petition to ban chlorpyrifos. (Produced as EPA-HQ-2017-006057 0000396)

Lyons, Troy, Associate Administrator, Office of Congressional and Intergovernmental Relations (OCIR)

- Was on the same email from EPW to Ryan Jackson about document requests for issues of interest to EPW. (Produced as EPA-HQ-2017-006057 0000404)

In addition, EPA searched for the name of Acting Deputy Administrator Mike Flynn in the database. No responsive documents to, from, or CC'ing Mike Flynn were found in the database.

Based on these results, EPA feels that it is unlikely that there are additional political-appointee or SES custodians that possess non-duplicative responsive records. If American Oversight would nonetheless like to expand its search to include these custodians, it should be aware that additional time will be necessary to complete the search and to review and produce responsive records, if any. Please let me know how you would like to proceed.

Johnny

From: Sara Creighton [<mailto:sara.creighton@americanoversight.org>]
Sent: Wednesday, November 1, 2017 3:55 PM
To: Walker, Johnny (USADC) <JWalker3@usa.doj.gov>
Subject: Re: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Johnny,

That status report looks fine to us. You have our authorization to file on our behalf.

Thanks,

Sara

On Nov 1, 2017, at 3:33 PM, Walker, Johnny (USADC)
<Johnny.Walker@usdoj.gov> wrote:

EPA just found another potentially responsive record in the CMS search, so I changed the number “three” to “four” in the second paragraph.

From: Walker, Johnny (USADC)
Sent: Wednesday, November 1, 2017 3:16 PM
To: 'Sara Creighton' <sara.creighton@americanoversight.org>
Subject: RE: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Here's a draft JSR. I suggest we take 30 days, in case there is some more back and forth that needs to happen after November 9. If we manage to resolve everything (or come to an impasse) earlier than that, I am happy to file sooner.

From: Sara Creighton [<mailto:sara.creighton@americanoversight.org>]
Sent: Wednesday, November 1, 2017 2:59 PM
To: Walker, Johnny (USADC) <JWalker3@usa.doj.gov>
Subject: Re: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Thanks Johnny, this is helpful. It seems like we should explain to the Court where we're at, and propose another status report for roughly a week after the agency gets us the additional records/information on the 9th. So perhaps on Friday, 11/17?

On Nov 1, 2017, at 2:43 PM, Walker, Johnny (USADC)
<Johnny.Walker@usdoj.gov> wrote:

Sara,

Answers are in red font interpolated with your questions below.

Johnny

From: Sara Creighton [<mailto:sara.creighton@americanoversight.org>]
Sent: Monday, October 30, 2017 5:11 PM
To: Walker, Johnny (USADC) <JWalker3@usa.doj.gov>
Subject: Re: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Johnny,

Thank you for your responses. We just have three follow-up questions/concerns:

1) Based on the description of the search below, it appears that no hard-copy documents were searched. Assuming that is correct, we would like to better understand why the agency did not believe that a search of hard-copy correspondence was reasonably likely to identify responsive records.

As explained below, email accounts are the most common repository of communications with EPA, and as such, are regularly searched in response to requests for communications. These are the repositories of communications tied to an individual "custodian," and therefore were the focus of the search. However, in response to this question, the Agency did a search of its formal correspondence management system [CMS] for any hard copy correspondence to the Agency. That search resulted in three potentially responsive records. The Agency is reviewing these three records and anticipates that it will be able to release them on or before November 9, 2017 (11/9).

2) With respect to the one email and attachments withheld in full under Exemption 6, the explanation below is a little bit confusing, so we wanted to clarify a few things. First, the explanation below suggests that the correspondence between the EPA employee and the person at Dow was wholly personal in nature. If that is correct, it's not clear why it was deemed to be an agency record at all. However, we are willing to accept the agency's representation that it was, in fact, purely personal in nature. Second, based on the search parameters provided below, we understood the

agency to have searched only for records containing the keywords pesticide and/or chlorpyrifos. If the email exchange in question hit on either of those terms, it seems unlikely to have been entirely personal in nature. If, on the other hand, the search wasn't limited to those terms, then we would just request clarification as to how the search was done.

As explained below, and looking at Part 2 of the request on its face and as clarified via email, the request appeared to ask for "all communications between individuals listed in Appendix A and any pesticide manufacturer or anyone acting on behalf of a pesticide manufacturer." This was clarified to communications between the individuals listed in Appendix A and any of four pesticide manufacturers: Dow Chemical; Dow AgroSciences; Makhteshim Agan of North America ("ADAMA"); FMC Corporation. This portion of the request was not narrowed by subject matter. The search that was conducted in Part 1 of the search request (below) was for any communications between the listed individuals at EPA and the domain names listed, with no other keywords applied. Therefore, these personal communications were located and on that basis deemed responsive.

3) With respect to the list of custodians whose files were searched, in addition to the 11 enumerated custodians you mentioned below, our FOIA request also asked the agency to search the records of "any other political appointees or SES employees in the Office of the Administrator." Is it the agency's position that there were no other such individuals as of July 10 (date of search)? Or did they just limit their search only to the enumerated names in our request? If the latter, we would like to know who the other political appointees or SES employees in the Office of the Administrator were as of the date of the search so that we can identify whether we believe any of them should have been included in the list of custodians.

The Agency does not generally search (and does not have the capability to search) "any other political appointees or SES employees in the office of the Administrator." Therefore, we understood the clarified search to be for the named individuals only (see June 27 email clarification referencing "the individuals listed in Appendix A" as subject to search). These individuals were searched as agreed.

The Agency is not required to compile lists or create documents to respond to a FOIA request. However, the Agency can try to determine if there are other political appointees or SES in the Administrators office at the relevant time who may have worked on pesticides or chlorpyrifos, and who were not part of the previous search. The Agency requests until the end of next week (11/9) to determine if other appointees or SES officials in the Administrator's office may potentially have responsive information, and will provide the names of those individuals (if any) to American Oversight.

Thank you,

Sara

Would they be willing to do a search of hard-copy correspondence in correspondence files of identified officials (and/or other political appointees).

On Oct 30, 2017, at 3:53 PM, Walker, Johnny (USADC)
<Johnny.Walker@usdoj.gov> wrote:

Sara,

The EPA's responses are interpolated with the inquiries in your October 19 email below. The responses are in red font. Let me know if this resolves the identified issues or if you have any other questions.

Johnny

From: Walker, Johnny (USADC)
Sent: Monday, October 30, 2017 11:52 AM
To: 'Sara Creighton' <sara.creighton@americanoversight.org>

Subject: RE: American Oversight v. EPA, 17-1227, Follow-Up on Documents

I emailed with EPA on Friday and their responses were nearly finalized. Hopefully I can get you something today.

From: Sara Creighton [<mailto:sara.creighton@americanoversight.org>]
Sent: Monday, October 30, 2017 11:48 AM
To: Walker, Johnny (USADC) <JWalker3@usa.doj.gov>
Subject: Re: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Johnny,

Any update from the EPA? We would obviously need the answers to these questions at least somewhat in advance of our status report so that we can evaluate whether we intend to challenge anything. If we don't have answers, I think we'll just need to file a status report that proposes a summary judgment briefing schedule, and then we'll see if we can resolve any outstanding issues before the government's brief is due.

Best,

Sara

On Oct 19, 2017, at 5:29 PM, Walker, Johnny (USADC)
<Johnny.Walker@usdoj.gov> wrote:

Sara,

I'll put these questions to the agency and get back to you.

Johnny

From: Sara Creighton
[mailto:sara.creighton@americanoversight.org]
Sent: Thursday, October 19, 2017 4:51 PM
To: Walker, Johnny (USADC) <JWalker3@usa.doj.gov>
Subject: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Johnny,

Thank you for completing production in this case. We have a few follow-up questions:

1) First, could you please provide us some more information about what the agency did to search for records responsive to our request? In particular, we would like to know (a) what custodians' files were searched, (b) what locations were searched (only email, or also other servers or hard copy locations?); (c) what search terms or methods were used to locate relevant files, and (d) what the date range for the search was (presumably based on the date the search was conducted).

This search was done based on the parameters that EPA staff negotiated with American Oversight, as per email exchanges dated June 27-June 28, 2017. Specifically, EPA searched the Outlook email accounts of: Scott Pruitt, Mike Flynn, Wendy Cleland-Hamnet, Richard Keigwin, Ryan Jackson, John Reeder, David Schnare, David Kreutzer, Don Benton, and George Sugiyama, who were the individuals listed in American Oversight's request. EPA also searched the email account of Shannon Kenny, who was the transition team coordinator and who would possess all communications with individuals, such as Myron Ebell, who were on the transition team but were not employed by EPA.

Because the request asked for “communications,” EPA searched the Outlook email accounts, which include emails, calendar invites, instant message chats, and text messages or other messages from alternative messaging systems forwarded in to EPA accounts as per EPA’s records policy. The Outlook email accounts represent the repository likely to contain records of “communications” with outside parties as requested. The parameters used for the electronic search are below:

Date Range:

01/20/2017 - 07/10/2017 (date of search)

Key Words:

Part 1:

Domain Name - TO: FROM: or CC:

"americanchemistry.com" OR "croplifeamerica.org" OR "fb.org"
OR "soygrowers.com" OR "americansugarbeet.org" OR
"ncga.com" OR "okfarmbureau.org" OR "cotton.org" OR
"ccgga.org" OR "ccqc.org" OR "cafreshfruit.com" OR "ffva.com"
OR "almondalliance.org" OR "wga.com" OR "dow.com" OR
"dowagro.com" OR "adama.com" OR "fmc.com" OR "cfbf.com"

Part 2:

Domain Name - TO: FROM: or CC:

"house.gov" OR "senate.gov" OR "heritage.org" OR
"heritageaction.org" OR "cato.org" OR "uschamber.com"

CONTAINING KEYWORD: (pesticide* OR chlorpyrifos)

2) Second, could you provide us with more information about the basis for the (b)(6) redactions on the pages listed below? For some, it seems like the redacted portions likely just reflect personal information (weekend plans, etc.), but we would like confirmation of the agency's position about what is personal in those emails. For others, it appears that the full name/email for certain individuals was redacted, and we would like to understand the agency's position about why they believe that merely revealing those individuals' participation in these communications would be an unwarranted invasion of their privacy.

- EPA-HQ-2017-006057-0000187

The redacted information is personal email addresses of what appear to be outside parties, that cannot be reasonably segregated nor identified beyond the address.

- EPA-HQ-2017-006057-0000188

Same document, personal email addresses and/or cell numbers

- EPA-HQ-2017-006057-0000192

Attachment, contains personal email addresses of non-EPA individuals that cannot be reasonably segregated or identified.

- EPA-HQ-2017-006057-0000197

The redacted information is personal email addresses of what appear to be outside parties, that cannot be reasonably segregated nor identified beyond the address.

- EPA-HQ-2017-006057-0000335

The redacted information relates to family and leave plans of an individual, the release of which would constitute an unwarranted invasion of personal privacy.

- EPA-HQ-2017-006057-0000336

Same document, family and leave plans and personal cell numbers

- EPA-HQ-2017-006057-0000338

Same exchange (earlier contained email) with family and leave plans of an individual.

- EPA-HQ-2017-006057-0000383

The redacted information relates to family and leave plans of an individual, the release of which would constitute an unwarranted invasion of personal privacy.

- EPA-HQ-2017-006057-0000386

Same exchange (earlier contained email) with family and leave plans of an individual.

- EPA-HQ-2017-006057-0000391

Personal email address of Jim Cowles, who is named in the released portion.

3) Third, we have questions about the four documents that were withheld from the 10/13 production, for which the agency has asserted Exemptions 6 and 4. It is not clear to us from the index provided with the production why an email from an executive at Dow Chemical to an EPA political appointee could possibly be withheld under Exemption 6. Given the conclusion that this was an agency record that was responsive to the request, and that one attachment to it was withheld under Exemption 4, we don't think the records could be purely personal in nature, and don't see how else they might qualify under Exemption 6.

The documents withheld under Exemption 6 consist of an email and two attachments. They were considered responsive because, under the terms of the request, it appeared that ANY communications between individuals at Dow and the named EPA individuals are "responsive." If the request is in fact for only information related to chlorpyrifos or pesticides, this email and

these two attachments, containing the personal information of an individual and not related to pesticides, would not be responsive.

The document withheld under Exemption 4 is not related in any way to the documents withheld under Exemption 6. Rather, the document withheld under Exemption 4 is a powerpoint presentation received as an attachment to an email that was released with Bates number EPA-HQ-2017-006057_0000097. The presentation relates to the pesticide Sulfoxaflor. The EPA can further inquire with our pesticide office regarding the potential release of this document if American Oversight is interested in obtaining this document.

4) Finally, we have questions about the agency's decision to withhold the decision memorandum requested in part (5) of our FOIA request pursuant to Exemption 5. Assuming that it is, in fact, a memorandum reflecting the final decision made by the agency, and reflects the agency's reason therefore, it should no longer be considered predecisional. *See Judicial Watch Inc. v. HHS*, 27 F. Supp. 2d 240, 245 (D.D.C. 1998) (noting that "deliberative process privilege does not protect documents that merely state or explain agency decisions"). At a minimum, even if parts of the memorandum discuss other positions that the agency ultimately did not take, those parts of the memorandum should simply be redacted, and the remaining, non-exempt materials should be segregated and produced.

The EPA has evaluated this memorandum and has determined that was drafted in order to provide internal advice to the Administrator regarding an Agency action. The document states on its face that it is internal and deliberative, and purports to be a recommendation and not a final decision of the agency. This internal and deliberative memorandum represents the Agency's internal advisory process and as such is not, in our view, reasonably segregable. The final decision and action taken by the Agency on this matter is in the public record.

We would appreciate any additional information you can provide

us in response to these questions. We very much hope to avoid summary judgment briefing by working with the agency on these issues if at all possible.

Best,

Sara Creighton

<2017-11-01 DRAFT JSR.docx>